FOR ARGUMENT

Supreme Court, U.S.
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In the Supreme Court of the United States

No. 77-1715

SECRETARY OF PUBLIC WELFARE, Commonwealth of Pennsylvania, ALDO COLAUTTI; JOHN FONG, Director of Haverford State Hospital; NICHOLAS D'ALUISIO, Director of Polk State School and Hospital; C. DUANE YOUNGBERG, Director of Pennhurst State School and Hospital, sued as representative of all others similarly situated,
Appellants

v.

INSTITUTIONALIZED JUVENILES in Pennsylvania Institutions for the mentally ill and mentally retarded, namely, KEVIN S.; RICHARD S.; JAMES PAUL M.; EDWARD B.; RAYMOND C.; WILLIAM B.; FRANCIS B.; MARIA L.; THOMAS W.; NANCY LOUISE D.; GINA S.; and GEORGE S., by their next friend and guardian ad litem, David Ferleger, individually and on behalf of all others similarly situated,
Appellees

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

REPLY BRIEF FOR APPELLANTS

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ARGUMENT

I. THE PARENTAL DECISION TO SEEK MEDICALLY RECOMMENDED MENTAL HEALTH CARE FOR THEIR CHILD DOES NOT IMPLICATE THE CHILD'S CONSTITUTIONALLY PROTECTED INTEREST IN LIBERTY

A. Scope of the Lower Court's Order

Appellees contend that the ruling of the lower court only applies when "institutional" care has been medically recommended.[1] While the appellants certainly wish this were so, unfortunately the order's breadth is undeniable. In fact, appellees themselves sought a class which included the directors of *all* mental health and mental retardation facilities (956a). Thus, appellees' statement that they claimed no relief against these non-institutional directors is simply at odds with the plain facts.[2]

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[1] Brief for Appellees at 52 n. 51. Appellees have never articulated their view of what is, and is not an "institution". Nevertheless appellants will use the term "non-institutional" to describe the home-like community-based facilities which currently are being provided in Pennsylvania. For a general description of Pennsylvania's program of providing community-based non-institutional alternative treatment modalities, see 3 Pa. Bull. 338 (Feb. 17, 1973). The high priority that is given to this form of residential treatment in Pennsylvania is set out in Knowlton, *Group Homes*, in National Association for Retarded Citizens, National Forum on Residential Services, 117 (1976).

[2] E.g. Brief for Appellees at 107 n. 129, where they recognized that they intended to include the directors of the approx-

In any event, at this point in the litigation, appellees' concession on this matter is of little value. Without question the terms of the District Court's injunction run against the directors of every mental health or retardation facility in Pennsylvania regardless of its characteristics.[3] In denying the appellants' Motion for a Stay, the District Court specifically ruled that its order was intended to include those children who were receiving care in non-institutional facilities.

In that Motion the actual numbers of children in the various institutional and non-institutional settings were detailed.[4] For example, appellants noted that there were 2,692 children receiving mental retardation care in privately operated facilities, 500 of whom were being served in group homes and apartments. Nevertheless the district court specifically included those 500 children within the scope of its order.[5] And finally, the District Court itself noted that, in its view, the underlying rationale for its decision, the stigma associated with mental illness, existed "regardless of the size of the institution or the actual conditions therein."[6]

Nevertheless the appellees' present position that they "make no claim regarding non-institutional care in this

imately 250 non-institutional facilities in the class of defendants they sued.

[3] 956a-959a; see also Defendants' Memorandum in Opposition to the United States' Request to Participate as "Litigating Amicus, Record No. 148 at 4, n. 6 (filed Feb. 27, 1978).

[4] Defendants' Motion for a Stay—Affidavit of G. Radke, Record No. 172 at ¶4, 5 and 6 (filed June 19, 1978).

[5] Memorandum and Order, Record No. 183 at 4 (filed July 17, 1978).

[6] 1070a.

case"[7] does shed some light on their aims in this suit. Rather than seeking protection from erroneous diagnoses of mental illness or retardation, appellees would have these adversary proceedings make the medical prescription of a specific type of treatment more difficult. In short, they are trying to effectuate "a reduced use of institutionalization."[8] As a policy matter it may indeed be true that the health professions or society in general will one day disapprove certain types of residential treatment for the mentally disabled which are currently in use. But until society acts this Court should reject the appellees' attempt to preempt the legislative processes by injecting meaningless and counterproductive adversarial hearings into the diagnostic process.

B. The Record Demonstrates That the Risk of Erroneous Medical Diagnoses or Recommendations for Residential Therapy Are Effectively Minimized by the Existing Procedures

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Before a child is received into residential treatment in a Pennsylvania facility, great care is taken to assure the accuracy of the diagnosis of the child's condition as well as the propriety of the type of treatment which is recommended to the family. Nevertheless, referring to the retarded class representatives, the appellees state that "there is nothing in their medical records indicating that

[7] Brief for appellees at 52 n. 51.

[8] Id. at 78.

their condition required institutional care . . ."[9] Quite the contrary is true.

For example, the medical records of George S. show that prior to admission he received at least three separate and complete psychological evaluations. In addition, a neuro-psychiatrist then examined George and concluded that he needed residential therapy in an institutional setting.[10] Finally, prior to admission those seeking George's admission were specifically questioned regarding their utilization of available resources within the community.[11] Significantly, through all of this there was no evidence of divergence of opinion on the fact of George's severe level of retardation or his need for the residential therapy he continues to receive.

Appellees have taken a similar approach with respect to the mentally ill. For example, they contend that Francis B. was admitted to treatment on the basis of "unamplified allegations of 'difficulties adjusting to school' ".[12] However, once again they have turned a blind eye toward the medical records. In fact, Francis was completely ex-

[9] Brief for Appellees at 18.

[10] Defendants' Exhibit No. 3, Psychiatric Summary, N.G. Frignito (January 10, 1967). In addition to the three psychological pre-admission examinations noted by Dr. Frignito, George was enrolled in a complete program as an out-patient in the Pediatric Clinic at Children's Hospital. Moreover, prior to his admission, he was given still other specific psychological evaluations e.g. Houston Test for Language, Gesell Normative Summaries, and Merrill Palmer Infant Scale. Defendants' Exhibit No. 3, Psychological Report of J. Newman (December 31, 1968).

[11] Defendants' Exhibit 3, Confidential Waiting List Questionnaire, Part V, "Community Resources".

[12] Brief for Appellees at 15.

amined on at least three separate occasions and screened by the Haverford medical staff before he was accepted for treatment.[13]

This practice of carefully evaluating prospective admissions is not unique to these cases. To the contrary, the record demonstrates that not one of the appellees was admitted to treatment with less than three independent psychiatric or psychological examinations, each recommending residential care.[14] In this vein, it is significant that not one of the appellees has sought to terminate his or her treatment program. In short, there is absolutely no evidence of even one erroneous admission in Pennsylvania.

Finally, referring to certain portions of the record, the appellees assert that the parties stipulated to an edited listing of the purported reasons children have been admitted for residential care.[15] First, there had never been agreement between the parties on this point. In fact the appellees have relied upon nothing more than summaries of numerous admission records which *they themselves*

[13] Defendants' Exhibit No. 9, Pediatric—Neurological Examination, D. Baker, M.D. (October 10, 1973); Psychological Evaluation, G. Mott, M.A. (June 29, 1976 through July 2, 1976); Psychiatric Evaluation, Dr. McElfresh (June 8, 1976) (in that evaluation Dr. McElfresh specifically recommended residential therapy at Haverford State Hospital), and Admission Note, M. Marcovici, M.D. (August 16, 1976).

[14] Brief for appellants at 44.

[15] Brief for appellees at 4-6. Appellees only reference to the record for this contention is to 522a-523a which merely contains a list of patients whose complete medical records the parties agreed should be admitted as evidence (522a-523a). However, appellants surmise that appellees intended to refer to portions of the "Final Pre-Hearing Order" (274a).

prepared. Moreover, the appellants specifically objected to all of this material as being both argumentative and grossly misleading.[16] Thus, if one were to use appellees' technique, one might well assert that patient #00144 was admitted to residential care because "she is entering pubescence" (353a). However, among other things, this completely overlooks her medical diagnosis of severe retardation and brain disease (353a). In short, the record, in its entirety, demonstrates that not one of the appellees or the class they represent has been whimsically admitted to treatment. In fact the appellees themselves acknowledge the appropriateness of the residential care which they are receiving when they argue that they are not seeking its termination in this lawsuit.[17]

C. The Decision in Planned Parenthood of Missouri v. Danforth,[18] if Applicable at All, Supports the Appellants' Position

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In *Danforth* this Court was confronted with a host of issues which formed the "logical and anticipated corrollary to *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 . . ."[19] One of those issues was the constitutionality of a Missouri statute which granted the parent of a pregnant minor the authority to unilaterally veto the decision of the mother and her physician

[16] 291a-297a contain the summaries. However appellants' specific objection to the use of anything less than the complete medical records is noted at 288a.

[17] Brief for appellees at 108.

[18] 428 U.S. 52 (1975).

[19] Id. at 72.

to terminate the pregnancy. Noting that the "very existence of the pregnancy already ha[d] fractured the family structure"[20] the court held that the rights of a "competent minor mature enough to have become pregnant" were impermissibly compromised by this statute.[21]

Each of the critical factors which existed in *Danforth* is absent here. First, there is no evidence that the interests of the parents and their children are "fundamentally in conflict."[22] In fact, as has already been pointed out, none of the appellees have taken issue with the wisdom of the joint decision between their parents and doctors regarding their treatment. Next, in contrast to *Danforth* the record here contains absolutely no evidence of the competence or maturity of these mentally ill and retarded children to select the appropriate medical care they should receive. The fact of the matter is that the Pennsylvania legislature has determined the contrary to be true. Moreover, that legislative determination has considerable support in the literature, and in any event is certainly not unreasonable.[23] In addition, the statute

[20] Id. at 75.

[21] Id.

[22] Id.

[23] One author, in agreement with Pennsylvania, has noted that minors under the age of fourteen should not be treated as adults in the context of an admission for treatment of mental illness. *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 Yale L.J. No. 1 at n. 112 and 113 (accompanying text) (galley proofs forwarded to the Clerk of this Court by the author on September 13, 1978). With respect to children under fourteen the commentator asserted that "parents may be—and in light of other considerations ought to be—given broad discretion. Although the pre-adolescent may well have preferences, he is not yet capable of making an intelligent choice" Id. at n. 117 (accompanying text).

in this case only authorizes parents to accept the medical recommendations for their child's treatment—not to veto such advice. Finally, the children here, unlike those in *Danforth*, have a variety of statutory opportunities to test the wisdom of this joint decision between the parents and physicians. E.g. 50 Pa. Stat. Ann. §4423(7) (right to independent psychiatric examination); 50 Pa. Stat. Ann. §4426, §7113 (habeas corpus); 50 Pa. Stat. Ann. §7206(b) (independent judicial review); and 3 Pa. Bull. 1840 (Sept. 1, 1973) (full judicial review for mentally retarded child over age thirteen); see also *Bellotti v. Baird*, 428 U.S. 132, 144-5, 147 (1976). Thus, viewed in the proper light, *Danforth* supports appellants' contention that the Pennsylvania statutes are constitutional.

CONCLUSION

On the basis of the foregoing arguments and authorities, as well as those contained in their main brief, appellants urge that the decision of the lower court must be reversed.

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